

Standing Order of the Commissioners  
Regarding Pre-Determination Case Process.

February 20, 2007

Recently, the Commission has re-evaluated and modified its procedures for conducting its investigations. We have learned that rote application of static procedures and policies does not always lead to an efficient, timely investigation. To prevent and eradicate discrimination in the Commonwealth, we have implemented procedures and processes designed to produce investigations that are more effective and timely. To help accomplish this, we have directed that every recommendation to the Investigating Commissioners for probable cause, lack of probable cause, and lack of jurisdiction will be reviewed by an agency attorney. Additionally, the Commission will endeavor to engage agency attorneys in every case at its inception to ensure that strategies and investigations properly reflect the legal components of each claim.

The Commission remains committed to its early mediation program and will continue to provide early mediation resources in appropriate cases—including the recent addition of another staff mediator—to the parties in both our Boston and Springfield offices.

In order to more closely align the pre-determination processes in both offices, to ensure that all cases are treated in an appropriate manner, to address the concerns of practitioners before the Commission, to better employ the limited resources of the Commission, and to achieve more effective, complete, and timely investigations, we Order the following:

The June 3, 2004, Standing Order regarding pre-determination discovery is hereby vacated.

In order to ensure that the basic framework in each Commission office for investigating complaints is the same, the Springfield Attorney Assisted and Pro Se Units will no longer exist. Instead, each Investigating Commissioner will determine whether to employ pre-determination discovery Orders and in appropriate cases shall issue such an Order. Investigating Commissioners may decide to employ such an Order if requested by the parties, if recommended by MCAD staff, or otherwise as the dictates of fairness may require. Such pre-determination discovery shall not extend beyond the scope of discovery described in 804 CMR 1.13(7) without an express Order of the Investigating Commissioner.

In the event that the Investigating Commissioner issues a pre-determination discovery order in a case, counsel for the parties shall not abuse their privilege of conducting such discovery on behalf of the Commission and discovery disputes shall be kept to a minimum. Where the Investigating Commissioner finds that counsel has not conducted discovery in good faith, has improperly diverted Commission resources, or has otherwise impeded the Commission's investigation, such counsel shall be sanctioned, including, but not limited to, the sanctions contained in 804 CMR 1.13(7) and/or barring such counsel from conducting pre-determination discovery on behalf of the Commission in any case before the Commission.

In those cases where the Investigating Commissioner issues a pre-determination discovery Order, the parties shall have ninety days to conduct the limited discovery described in 804 CMR 1.13(7). All discovery, subpoenas, and other requests shall be served early enough in this period to allow a timely response within the ninety-day discovery period. The parties may submit memoranda of fact and law to the Commission within thirty days of the close of pre-determination discovery and must supply a copy its memorandum to each other party in the matter. Parties are encouraged to submit a single, joint memorandum of fact and law.

The Commission may conduct pre-determination discovery in its name at any point after accepting the Complaint. Parties providing information to the Commission in response to its discovery requests shall also provide copies of the information to each other party in the matter, unless the Investigating Commissioner issues a protective order for good cause shown. All protective orders shall be drafted as narrowly as possible to protect the interests of the parties and allow effective disclosure. Unless the Investigating Commissioner issues a protective order for good cause shown, Complainants shall provide a copy of their rebuttals to each other party in the matter.

The Commission welcomes the input of the parties in developing its requests for information. Accordingly, parties may request, in writing or orally, that the Commission seek certain information as part of its investigation. Parties may also request investigative conferences in appropriate cases.

The Commission will immediately cease the practice of issuing pre-probable cause determinations. All cases currently subject to a pre-probable cause determination shall be evaluated as soon as is practicable to establish whether the evidence warrants a probable cause determination. In those cases where the evidence warrants it, the pre-probable cause conference shall be cancelled and a probable cause finding shall issue.

To reduce the number of continuances requested, to ensure each investigation is completed in a timely manner, and to conserve the limited resources of the Commission, the agency will allow a party a total of not more than twenty-five days of extensions during the investigative process. All requests for extensions shall be made in writing. Requests for extensions beyond a total of twenty-five days will be looked at with disfavor and will be entertained only in the most grave circumstances. As with the discovery process, where the Investigating Commissioner determines a party and/or counsel has made extension requests that are excessive, not in good faith, and/or are otherwise damaging to the agency, its investigation, or its process, the party and/or counsel shall be sanctioned.

This Order is effective immediately. Springfield AAU cases where a pre-determination discovery Order has issued shall continue under that Order. Springfield AAU cases where a pre-determination discovery Order has not yet issued will follow the new process.

So ordered,

Walter J. Sullivan, Jr., Chair  
Martin S. Ebel, Commissioner